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Constitutional Law - Court Order Prohibiting Photographing of Spectators on Streets and Sidewalks Surrounding Courthouse, Held Not To Be Abuse of Discretion of Court - Atlanta Newspapers, Inc. v. Grimes, 216 Ga. 74, 114 S.E.2d 421 (1960)

DePaul College of Law

CASE NOTES

CONSTITUTIONAL LAW–COURT ORDER PROHIBITING PHOTOGRAPHING OF SPECTATORS ON STREETS AND SIDEWALKS SURROUNDING COURTHOUSE, HELD NOT TO BE ABUSE OF DISCRETION OF COURT

A house of worship in Georgia was damaged by an explosion. Bombing was alleged, and five men were arrested and charged with the crime. The occurrence received such wide publicity that on the day of the indictment a large crowd gathered in the corridors outside the courtroom and in the surrounding streets. Among those present were numerous represpentatives of the press, radio, and television, who reported, broadcast, televised, and recorded statements made by counsel for the defendants. As a result of these incidents a court order with respect to proceedings was issued by the Superior Court of Fulton County. Paragraph three of that order stated: "No photograph of any party to any trial or of any defendant, prosecutor, attorney, witness, juror, spectator, or other participant in or at any trial, shall be taken at any place in the courthouse building, on the courthouse steps, or on the adjacent sidewalks and public streets. Nothing done or said by any such person at any such place shall be recorded by any television instrument, moving-picture camera or other instrument, sound-scriber, tape recorder, wire recorder, or any other recording device or equipment. This rule 3rd shall apply at all times during trials, and in respect of a particular trial, until it shall have been completed and all persons in attendance thereon shall have retired from the courthouse and adjacent sidewalks and public streets, and thereafter shall have dispersed."[1] Atlanta Newspapers, Inc. brought a petition against T. Ralph Grimes, Sheriff of Fulton County, alleging that paragraph three of the order was unconstitutional, in that its enforcement denied to petitioners and other members of the public the liberty of speech and press guaranteed by article I, section I, paragraph XV of the Constitution of the State of Georgia. The court entered an adverse judgment, and petitioners took exception to that portion of the order which prohibited the photographing of spectators and other persons, not in the custody of the court, on streets and sidewalks surrounding the courthouse. The Supreme Court of Georgia affirmed the judgment of the Superior Court, holding that discretion in regulating the court was confined to the judge, and under the circumstances the order did not seem to be an abuse

[1] Atlanta Newspapers, Inc. v. Grimes, 216 Ga. 74, 75, 114 S.E. 2d 421, 422 (1960).

of that discretion. *Atlanta Newspapers, Inc. v. Grimes*, 216 Ga. 74, 114 S.E. 2d 421 (1960).

The interests represented in the present case—free speech versus fair trial—have long been the focal point of bitter controversy between the press and the judiciary. Both are necessary and basic interests in our system of government, for individual freedom depends in large measure upon the maintenance of an independent press and independent courts. Since judicial decisions down through history have affected the balance between these two interests, a historical study of the controversy is essential for a true analysis and criticism of the decision in the present case.

The first amendment to the Constitution of the United States declares: "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."[2] Historically, the concept of free speech and press has benefited from a liberal construction by the courts, so that now all forms of communication including broadcasting, television, and motion pictures are within the scope and are entitled to the protection of the first amendment.[3] Since broadcasting, television, recordings, and photographs were prohibited by the court order in the case being noted, it was essential to petitioners' bill that all forms of communication be constitutionally protected. It is, however, a well settled principle of law that no freedoms are absolutely and unqualifiedly protected, and this principle includes first amendment freedoms.[4]

The freedoms of speech and of press are firmly secured by the first amendment against abridgment by the federal government.[5] Although the Constitution was established by the people of the United States for themselves, for their own government and not for the government of the individual states,[6] the first amendment freedoms are considered so fundamental that they are also secured to all persons by the due process clause of the fourteenth amendment against abridgment by the states.[7] The fourteenth amendment, therefore, through the broad and rather undefined due proces clause, incorporated the first amendment, and secured its guarantees for all members of society against encroachment by the states.[8]

Conversely, the due process clause of the fourteenth amendment does

[2] U.S. CONST., amend. I.

[3] Burstyn v. Wilson, 343 U.S. 495 (1952); *accord*, American Broadcasting Co. v. United States, 110 F. Supp. 374 (S.D. 1953). For a discussion of Burstyn v. Wilson, *supra*, see Comment, 3 DE PAUL L. REV. 227 (1953-54).

[4] Debs v. United States, 249 U.S. 211 (1919).

[5] Schneider v. State, 308 U.S. 147 (1939).

[6] Barron v. Baltimore, 32 U.S. 243 (1833).

[7] Gitlow v. New York, 268 U.S. 652 (1925).

[8] United States v. Cruikshank, 92 U.S. 542 (1875).

not incorporate as such, the specific guarantees found in the sixth amendment.[9] However, a denial by a state of the rights specifically contained in the sixth amendment may, under the circumstances, deprive a defendant of due process of law, in violation of the fourteenth amendment.[10] There are no hard and fast rules governing the application of the due process clause to state criminal proceedings.[11] But in general, what constitutes a denial of due process is the conviction of one whose trial is offensive to common and fundamental ideas of fairness and is shocking to the conscience of the court.[12]

More difficult questions are: "What constitutes a public trial?" and "What discretion may a court exercise in limiting the audience and spectators?" Several state and federal jurisdictions have answered these questions with contradictory rulings.[13] It is now well settled, however, that the sixth amendment does not apply to trials in state courts;[14] and it would follow that the guarantees of free speech and press are also inapplicable to trials in state courts, for these freedoms do not grant to the public, or to the press, the constitutional right of gaining access to all places, whether public or private, in order to secure information for publication.[15] The courts possess inherent power to punish any activity calculated to interfere with the proper administration of justice, and this power is not restricted by the constitutional guarantee of free press, because freedom of the press is subordinate to the proper administration of justice.[16]

It remains then, to trace some of the more important decisions and legislative enactments which have affected the equilibrium between the independence of the press and the independence of the judiciary an equilibrium that must be maintained if a free system of government is to survive.

The Constitution vested the judicial power of the United States in the

[9] U.S. CONST. amend. VI, provides in part that "in all criminal proceedings the accused shall enjoy the right to a speedy and public trial. . . ."

[10] Betts v. Brady, 316 U.S. 455 (1942).

[11] Powell v. Alabama, 287 U.S. 45 (1932).

[12] Betts v. Brady, 316 U.S. 455 (1942).

[13] *In re* Oliver, 333 U.S. 257 (1948); *accord*, Davis v. United States, 247 Fed. 394 (8th Cir. 1917); People v. Murray, 89 Mich. 276, 50 N.W. 995 (1891). *Contra*, Reagan v. United States, 202 Fed. 488 (9th Cir. 1913).

[14] Betts v. Brady, 316 U.S. 455 (1942).

[15] United Press Ass'ns v. Valente, 120 N.Y.S. 2d 642 (1953) held that the court had the power to make an order which excluded the public and the press from the court where evidence of sodomy was introduced.

[16] McGill v. State, 209 Ga. 500, 74 S.E. 2d 78 (1953). See State v. Clifford, 162 Ohio St. 370, 123 N.E. 2d 8 (1954). *Cf.* Bridges v. California, 314 U.S. 252 (1941).

Supreme Court and in such inferior courts as Congress might establish from time to time.[17] When the inferior federal courts were established, their power to punish summarily for contempt of court was rather broad and undefined, and the first legislative enactment by Congress which limited that power was the Act of March 2, 1831.[18] The immediate occasion of the Act of 1831 was the impeachment and subsequent acquittal in Congress of Judge James H. Peck, who incarcerated and disbarred a defendant for publishing an adverse criticism of one of the judge's opinions in a case coming up on appeal.[19] *Ex parte Poulson*[20] upheld the Act of 1831, and declared that the federal courts could not punish summarily for contempt of court one whose newspaper article tended to prejudice the rights of the parties to a suit on trial. The rationale of the court was that the article did not occur in the presence of the court or *so near thereto* as to obstruct the administration of justice.

Much of the ensuing controversy between the press and the judiciary revolved around the construction of the words *so near thereto*, that is, whether they were to be given a geographical or a causal connotation. After the *Poulson* decision a number of cases expanded the *so near thereto* concept into the area of causality.[21] In *Toledo Newspaper Co. v. United States*[22] the Court held that the words *so near thereto* are not to be limited, in a geographical sense, to contempts committed within or near the physical presence of the court. But *Nye v. United States*[23] overruled the *Toledo* decision, holding that the phrase could not apply to acts committed beyond the physical presence of the court. Rather, the phrase meant that the misbehavior must have occurred *in the vicinity* of the court.

Analogous to the *so near thereto* concept is the *clear and present danger* rule of law, first enunciated by Mr. Justice Holmes in *Schenck v. United States*,[24] in which he stated: "The question in every case is whether the words used are used in such circumstances and are of such

[17] U.S. CONST. art. III, § 1.

[18] 18 U.S.C.A. § 401 (Supp. 1959) states: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice. . . ."

[19] STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833).

[20] 19 Fed.Cas. 1205 (No. 11,350) (E.D. Pa. 1835).

[21] *In re* Independent Pub. Co., 228 Fed. 787 (D. Mont. 1915); Kirk v. United States, 192 Fed. 273 (9th Cir. 1911); United States v. Zavelo, 177 Fed. 536 (N.D. Ala. 1910); *In re* Brule, 71 Fed. 943 (D.Nev. 1895).

[22] 247 U.S. 402 (1918).

[23] 313 U.S. 33 (1941).

[24] 249 U.S. 47 (1919).

nature as to create a *clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.*"[25] The rule, applicable to all forms of communication, and not merely to words, has had a widespread influence in the field of legal jurisprudence. It has been invoked with outstanding success in contempt proceedings as in *Craig v. Harney*,[26] in which the Court held that the conviction of a newspaperman for contempt of court violated freedom of the press guaranteed by the first and fourteenth amendments, for even though the news articles reported events unfairly, and attacked the trial judge during the pendency of a motion for a new trial, such conduct did not, under the circumstances, constitute a *clear and present danger* to the proper administration of justice.

In the case being noted reference was made to Canon 35 of the Canons of Judicial Ethics.[27] The Canon is extremely strict, prohibiting all photographs, broadcasting, and television during court sessions. Its origin was *State v. Hauptmann*,[28] in which the court noted the excessive popular excitement, before and during the trial, of the courtroom crowded with spectators and press photographers, and of the general disorder at all stages of the murder prosecution of the alleged kidnapper of the Lindberg child. The legal significance of Canon 35 is that it has been adopted in either its original or amended version, as a statute or a rule of court, in twenty states, and by bar associations in twelve other states, including Georgia.[29] It would appear from the opinion in the principal case that the Georgia court impliedly adopted Canon 35 as a rule of court.

Because Canon 35 limits the activity of the press within the courtroom, it has been the object of repeated attacks by the press since its formulation. The courts have argued that photography, television and broadcasting within the courtroom distract the witnesses, make a public spectacle out of a trial, and degrade the dignity of the court. On the other hand, the press has argued that since the *Hauptmann* case, improved techniques and modern noiseless equipment render Canon 35 no longer applicable. Perhaps the most extensive discussion of this problem occurred in *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*,[30] in which the court concluded that proceedings in the courtroom should be

[25] *Id.* at 52. (Emphasis added.)

[26] 331 U.S. 367 (1947). *Accord*, Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

[27] ABA, CANONS OF PROFESSIONAL AND JUDICIAL ETHICS at 57 (1957).

[28] 115 N. J. L. 412, 180 Atl. 809 (1935).

[29] BRAND, BAR ASSOCIATIONS, ATTORNEYS AND JUDGES 911–12 (1956); and BRAND, BAR ASSOCIATIONS, ATTORNEYS AND JUDGES, SUPPLEMENT, 288 (1959).

[30] 132 Colo. 591, 296 P. 2d 465 (1956).

conducted with dignity and decorum, and that it is entirely within the discretion of the judge to stop representatives of the press in any field of activity which creates distractions interfering with orderly court procedure. Evidence was also introduced, however, establishng the fact that the use of cameras, radio, and television would not invariably interfere with the proper administration of justice. In fact, evidence conclusively proved that photographs can now be taken by the press within the courtroom with little or no detection by others present.

It follows logically from the foregoing discussion that the photographing of spectators and other persons, not in the custody of the court, on streets and sidewalks surrounding the courthouse, is not violative of the *so near thereto* concept in either a causal or a geographical sense. Nor is it violative of the *clear and present danger rule,* because the photographing of spectators beyond the courtroom is an activity too remote to be considered a *clear and present danger* to the proper administration of justice. Finally, such photography is not violative of Canon 35, because this canon concerns activities exclusively *within* the courtroom.

In the case under consideration, certiorari was recently denied per curiam by the United States Supreme Court.[31] Such denial, however, does not act as a final determination of the subject, for the controversy will endure as long as judges continue to extend their powers beyond the courtroom to acts which do not interfere with the proper administration of justice.

[31] Atlanta Newspapers, Inc. v. Grimes, 29 U.S.L. WEEK 3101 (U.S. Oct. 11, 1960) (No. 237).

CONSTITUTIONAL LAW—OHIO SUPREME COURT UPHOLDS CONVICTION UNDER STATUTE PROHIBITING "KNOWING POSSESSION" OF OBSCENE LITERATURE

In packing the belongings of a tenant for storage until his return, defendant discovered some lewd and lascivious books and pictures. Without any intent to exhibit, distribute or look at them again, she placed them in the storage box for her departed roomer's return. Armed with a search warrant to look for policy paraphernalia, three policemen discovered the obscene material in defendant's bedroom and thereupon arrested her;[1] she was subsequently convicted for violation of an Ohio

[1] The Supreme Court has held that in state prosecutions for violations of state statutes, evidence obtained by an illegal search and seizure is admissible. Wolf v. Colorado, 338 U.S. 25 (1949); Stefanelli v. Minard, 342 U.S. 117 (1951). *But see* Elkins v. United States, 364 U.S. 206 (1960). Ohio has ruled that such evidence is admissible in their courts. State v. Lindway, 131 Ohio St. 166, 2 N.E. 2d 490 (1936), *cert. denied,* 299 U.S. 506 (1936).